FIL

IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1960

No._____

F. M. REEVES AND SONS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION OF F. M. REEVES AND SONS, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

F. M. Reeves and Sons, Inc., a corporation, Respondent in the court below, hereinafter referred to as Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on January 19, 1961.

OPINION BELOW

The Court of Appeals rendered no memorandum opinion, but its Order adjudging Petitioner in civil contempt may be found at page 60 of the Transcript of Record of this contempt proceeding, and a copy of said Order is included herein as Appendix A, p. 21.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1961. Jurisdiction of this Court is invoked under 28 *U.S.C.A.*, Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in adjudging Petitioner guilty of civil contempt and in violation of that part of Respondent's enforced order which directed Petitioner to cease and desist from:

> "(a) Refusing to bargain with the Union as the exclusive representative of all of its employees in the unit found to be appropriate . . . with respect to rates of pay, wages," . . .

when the uncontradicted facts show that it was the Union that refused to bargain for and agree upon a general wage increase, unless Petitioner would agree to the Union's demands for a "Union shop" and other concessions, which demands the Union then knew Petitioner would not accede to.

2. Whether the Court of Appeals committed reversible error in adjudging Petitioner guilty of civil contempt and in violation of that part of Respondent's enforced order which directed Petitioner to cease and desist from:

> "(b) Refusing to bargain with the Union by offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain or coerce its employees in the exercise of their right to self-organization," . . .

when the uncontradicted facts show that such wage increases as were granted by Petitioner, to less than half of its employees; were given by reason of compelling business and economic necessity since the Union was refusing to bargain for and agree upon a necessary general wage increase, unless granted a "Union shop", and that such increases were not given in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or as an unlawful device to interfere with, restrain or coerce its employees in the exercise of their right of self-organization.

3. Whether the Court of Appeals committed reversible error in holding that as a matter of law the proposal alleged to have been made by Petitioner in the course of negotiations with the Union that a performance bond or other security be furnished by the Union, amounted to bargaining not in good faith, and hence constituted contempt.

4. Whether the Court of Appeals committed reversible error in not holding that the Union and the National Labor Relations Board had ratified and approved the limited wage increases set up by Petitioner, so that they are now barred from claiming that the same were unilaterally given.

STATEMENT

This is a civil contempt proceeding brought by the National Labor Relations Board (referred to herein as Respondent), against F. M. Reeves and Sons, Inc., a corporation (referred to herein as Petitioner), seeking to have Petitioner adjudged guilty of contempt in violating certain provisions of Respondent's enforced cease and desist order, the material parts of which order are hereinbefore quoted as set out in the Petition for Adjudication In Civil Contempt filed by Respondent in the Court below. (R. 16-23).

Respondent's Decision and Order appear on pages 21 to 26 of the Transcript of Record of the enforcement proceeding, nine copies of which Record were sent up with the Record herein. A copy of said Decision and Order is included herein as Appendix B, p. 23.

The facts alleged by Respondent as constituting such violation and contempt are that in August, 1960, while the parties were engaged in collective bargaining negotiations, Petitioner refused to bargain in good faith, by-passed the Union, and granted unilateral wage increases to 22 of its 52 employees in the bargaining unit. (R. 17-18).

By a later, unsworn motion for leave to amend, telegraphed from Washington directly to the Court in Denver, Colorado, Respondent sought to add the further charge that Petitioner had been guilty of not bargaining in good faith, in that in the course of bargaining negotiations Petitioner had insisted that the Union secure performance of its obligations under any contract entered into, by providing security therefor. (R. 35). Petitioner resisted said motion to amend. (R. 36-37). The Record contains no showing that said motion to amend was ever allowed, but the judgment of the lower court refers to said additional charge of bad faith bargaining as if it were in the Record. (R. 61).

By its sworn Answer (R. 25-34), supported by the Affidavit of its Personnel Manager, G. E. Pike (R. 55-59), Petitioner emphatically denied that it had in anywise violated the enforcement decree entered by the lower court on January 18, 1960, or that it was in contempt. Said Answer and Affidavit set forth in detail the facts and circumstances connected with Petitioner's negotiations with the Union in 1960, and the granting by it of wage increases to less than half of its employees, all of which are summarized as follows:

Negotiations between the parties began in March, 1960, and were still in progress at the time of the filing of this contempt proceeding on November 10, 1960; in June, 1960, the United States Government let a large contract involving a proposed expenditure of some $22,000,000.00 for the construction of a National Defense Project including 12 missile launching sites in the area around Roswell, New Mexico, at which place Petitioner has one of its plants for handling sand and gravel, and for producing ready-mixed concrete; in July, 1960, Petitioner was awarded a purchase order for furnishing all the ready-mixed concrete for said Defense Project at a cost of about $2,000,000.00; this large construction project greatly increased activity in the area and caused a sharp rise in wages, particularly among construction workers, truck drivers, and other types of employees generally hired by Petitioner; from the time the present owners acquired control and management of Petitioner in December, 1958, up to August, 1960, there had been no general wage increases at Petitioner's Roswell plant; Petitioner realized the necessity in 1960 for such wage increases because it was constantly losing its employees to competitors and others who were and are paying much higher wages than Petitioner pays; accordingly, in the course of said 1960 negotiations, Petitioner sought to get the Union to agree to a general wage increase in order that it might be able to maintain an adequate labor force, but the Union steadfastly refused so to agree, unless Petitioner would first agree to the Union's demand for a "Union shop" and other concessions, which demands the Union then knew Petitioner would not accede to; such demand by the Union for a "Union shop" as a price for allowing a general wage increase was persisted in by the Union up until after the institution of this contempt proceeding on

November 10, 1960; confronted by the absolute necessity of maintaining an adequate labor force to enable it to meet its obligations under its purchase order for delivery of material for said National Defense Project, and with the Union's refusal to consent to a general wage increase without a "Union shop", Petitioner, in early August, 1960, was compelled out of business necessity to set up certain wage increases, the same being granted in perfect good faith and affecting less than half of Petitioner's employees; at the next bargaining session, on August 16-17, 1960, Petitioner fully explained to the Union's representatives just what had been done in respect to the granting of said limited wage increases and the compelling necessity that caused them to be put into effect; not a word of dissent or objection was voiced at said meeting by the Union's representatives over the granting of said limited wage increases, and Petitioner reasonably was led to believe that they were agreeable to the Union, until receipt of notice on September 10, 1960, of the filing of the "Charge" that led to this contempt proceeding.

It was further shown in Petitioner's Answer that Respondent through its Assistant General Counsel had notified Petitioner before the hearing that the wage increases granted by Petitioner and made the basis of this contempt proceeding would be left in effect. (R. 33).

Under the foregoing facts, which are undisputed, Petitioner defended against the charge of contempt upon the following grounds: (1) Petitioner had not refused to bargain with the Union with respect to rates of pay and wages, but such refusal was by the Union itself in declining to bargain for and agree upon a general wage increase without a "Union shop"; (2) the wage increases granted by Petitioner to less than half of its employees were not

offered in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, but were given in good faith, solely as the result of economic and business necessity, since the Union would not bargain for and agree upon a general wage increase without a "Union shop"; (3) while there is no showing in this Record that Petitioner ever demanded of the Union an indemnity bond or other security as a condition precedent to the execution of a negotiated contract, nevertheless a proposal that a performance bond or security be given by the Union could not amount, as a matter of law, to bad faith bargaining on the part of Petitioner; (4) the Union and Respondent had ratified and approved said limited wage increases given by Petitioner, which fact should bar them from seeking to have Petitioner punished for putting such increases into effect.

The lower court allowed none of said defenses; ignored the fact that it was the Union itself that had refused to bargain for and agree upon a general wage increase without a "Union shop"; treated the enforced order as forbidding any and all unilateral wage increases, despite the express language thereof which forbade only those given in derogation of the Union's status *and* in an attempt to win employee allegiance from the Union; held as a matter of law that the bare proposal by Petitioner for a performance bond from the Union constituted bad faith bargaining and contempt; and took no notice of the fact that the Union and Respondent had ratified and approved the limited wage increases set up by Petitioner and now made the basis of this contempt proceeding. (R. 60-61.).

Having thus thrown out or ignored Petitioner's defenses, the lower court proceeded to impose against Petitioner a

fine of One Thousand Dollars ($1,000.00) as punishment for contempt. (R. 61; App. A, p. 21).

The Court of Appeals for the Tenth Circuit had jurisdiction of the parties hereto by reason of the filing in said Court on March 17, 1959, of a petition styled *National Labor Relations Board, Petitioner, v. F. M. Reeves and Sons, Inc., Respondent,* No. 6125, wherein said Board sought a decree enforcing its cease and desist order theretofore issued against F. M. Reeves and Sons, Inc., pursuant to 61 Stat. 136, 29 *U.S.C.A.* Secs. 151 et seq., particularly Sec. 160 (e), as amended by 72 Stat. 945. Said Petition for Enforcement Decree appears at pages 1-3 in the Transcript of Record of said enforcement proceeding, nine copies of which Record were sent up with this Record. The opinion of the lower court in said enforcement proceeding appears at pages 3-14 in the Transcript of Record of this contempt proceeding, and is published in 273 F. 2d 710 (C.A. 10th, 1959). A copy of said Opinion is included herein as Appendix C, p. 28. The Enforcement Decree entered thereon by the lower court, and with the violation of which Petitioner is now charged, appears at page 15 of the Transcript of Record of this contempt proceeding. A copy of said Enforcement Decree is included herein as Appendix D, p. 37.

REASONS FOR GRANTING THE WRIT

1. The judgment of the lower court sought to be reviewed herein, is clearly erroneous in failing to sustain Petitioner's defense based on the undisputed facts showing it was the Union itself, and not Petitioner, which had wrongfully refused to bargain and agree with respect to wages.

(a) As shown in Petitioner's sworn answer (R. 31), and in the supporting affidavit of G. E. Pike (R. 58), the Union refused to bargain for and agree upon a general wage increase unless Petitioner would agree to a "Union shop" and other Union demands which it was notified Petitioner would not consent to. Not a word in this Record controverts this plain fact, for Respondent offered no evidence whatsoever. Under such showing it was error to hold that Petitioner had refused to bargain on wages and had thus violated the enforcement decree.

(b) Said judgment of the lower court is in direct conflict on this point with decisions by other courts of appeal. Thus, where a union persisted in a demand for a union shop as a condition precedent to a contract, to which demand the employer would not accede, it was held that such position did "not justify the conclusion of a refusal to bargain", *N. L. R. B. v. Algoma, etc., Co.*, 121 F. 2d 602, 606 (C.C.A. 7th, 1941). Again, where a union would not agree to any wage increases without a contract containing a maintenance of union membership clause, contempt proceedings brought by the National Labor Relations Board charging the employer with refusing to bargain, and with unilaterally granting wage increases, were thrown out, *N. L. R. B. v. Standard Trouser Co.*, 162 F. 2d 1012 (C.C.A. 4th, 1947). Likewise, where a union refused to consider wage increases unless further concessions were made by the Respondent employer, and "it became increasingly difficult for Respondent under the existing wage scale, either to obtain new employees, or to retain those already in his employ", it was held that unilateral wage increases should be upheld, and contempt proceedings brought by the Board should be dismissed, *N. L. R. B. v. Norfolk, etc., Corp.*, 195 F. 2d 632, 637 (C.A. 4th, 1952).

2. Said judgment of the lower court is further clearly erroneous in holding Petitioner's "granting of the unilateral wage increase without consent of the Union constituted contempt" of court, when the Board's order, enforced by the lower court's decree, shows on its face that not all unilateral wage increases were forbidden thereby, but only those offered *"in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union."* (R. 16). (Emphasis supplied).

(a) The undisputed facts set out in Petitioner's sworn Answer, (R. 31), and in the supporting Affidavit of G. E. Pike, (R. 58), show that the limited wage increases here involved had to be given out of business and economic necessity, to enable Petitioner to maintain an adequate labor force whereby it could meet its obligations under its purchase order for the supply of ready-mixed concrete for a large and important National Defense Project. With the Union refusing to consider a necessary general wage increase except on terms Petitioner could not accept, no other course was open to Petitionor. These facts show affirmatively that such wage increases were not granted "in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union." The lower court mistakenly assumed that the enforced Order forbade every unilateral wage increase regardless of motive. As above shown, such is not the plain language of the enforced Order, and it is the language of that Order which must control. Petitioner cannot be held guilty under other or different language not in the Order.

(b) Said judgment of the lower court is in direct conflict on this point with decisions by other courts of appeal,

which hold that the motive and circumstances connected with the granting of unilateral wage increases must be looked to in determining the legality thereof. This is shown by the cases hereinbefore cited from the Court of Appeals for the Fourth Circuit, wherein unilateral wage increases were upheld, and contempt proceedings dismissed, when it appeared that the wage increases involved were not granted for the purpose of undermining the Union, but for other and entirely legitimate reasons. *N. L. R. B. v. Standard Trouser Co.*, supra; *N. L. R. B. v. Norfolk, etc., Co.*, supra.

Not only does this rule apply to unilateral wage increases and contempt proceedings brought therefor, but to the determination of unfair labor practices as well. Thus, in the leading case of *N.L.R.B. v. Cleveland Trust Co.*, 214 F. 2d 95 (C.A. 6th, 1954), the Court of Appeals for the Sixth Circuit directly held that unless the wage increase is given for the purpose of undermining union power, then there is no unfair labor practice. Said the court: "There is no evidence in the record that the vacation increases were determined in order to influence employees to vote against the Union . . . No evidence was adduced controverting Respondent's sworn statement that this increase was made to correct inequalities by the increase in the cost of living." p. 99. Accordingly, enforcement of the Board's order was denied.

The Cleveland case, supra, was cited and followed in *N.L.R.B. v. Newton Co.*, 236 F. 2d 438 (C.A. 5th, 1956), wherein the Court of Appeals for the Fifth Circuit overruled the Board's finding that wage increases had there been given to discourage union participation, since it appeared that "there were valid reasons other than an effort to discourage union organization" for such increases. Ac-

cordingly, as to this part of the Board's order enforcement was denied.

In *N.L.R.B. v. Norfolk etc. Corp.*, supra, the Court of Appeals for the Fourth Circuit, in upholding unilateral wage increases and dismissing contempt proceedings brought therefor, said: "There is ground for the view that the notices were posted not for the purpose of undercutting the union or impairing its usefulness, but rather in the belief that the employees . . . might remain in Respondent's employ, even in the face of higher wages elsewhere." p. 637.

The recent case of *Cone v. N.L.R.B.*, 235 F. 2d 37 (C. A. 4th, 1956; cert. den., 352 U.S. 916, 77 Sup. Ct. 214, 1 L.Ed. 2d 122.), squarely holds that motive for a unilateral wage increase is a determinative factor on the issue of its legality. In sustaining the unilateral wage increases there involved and denying enforcement of the Board's order with respect thereto, the Court quoted with approval from the Examiner's report, as follows: "the Examiner does not find that the raise was given with the destruction of the Union's majority as its premeditated goal . . . the factors pointing to a business necessity for granting the raise puts the matter of actual motive in sufficient doubt for Respondent to be entitled to the benefits thereof". As here shown, if a real doubt exists as to the motive for the granting of a unilateral wage increase, then the employer is entitled to the benefit of that doubt. In the case at bar there is not even a doubt as to the motive for the granting of the limited unilateral wage increases here involved, for the undisputed facts affirmatively show them to have been given in good faith, out of "business necessity", and with no purpose of undermining the union.

To the same effect are at least two decisions by the National Labor Relations Board itself. In *Libby, McNeil & Libby*, 65 N.L.R.B. 873, the Board held that the unilateral inauguration by an employer of an incentive plan was not *per se* illegal, unless there was proof that the increases were part of a plan to undermine the union. In *Essex Rubber Co.*, 50 N.L.R.B. 283, the Board held that wage increases granted by an employer to induce its employees to stop resigning and taking jobs elsewhere with competitors, should be sustained.

3. Said judgment of the lower court is further clearly erroneous in holding as a matter of law that the alleged proposal by Petitioner that the Union furnish a performance bond, whether made in the form of a request or a demand, "amounted to a bar to negotiating in good faith and, thereby constituted contempt of this court."

(a) As hereinbefore shown, this additional charge of bad faith bargaining was embodied in an unsworn motion for leave to amend telegraphed from Washington directly to the Court in Denver a short time before the hearing. (R. 35). Petitioner answered said motion and resisted the allowance thereof. (R. 36-37). No action by the court on this motion is shown in the Transcript though in its Order the court treated the additional charge as being in the Record. (R. 61). No order to answer said charge was ever issued or served on Petitioner. Had Petitioner been afforded proper opportunity to file a sworn answer to said allegation after the motion for leave to amend had been acted upon and allowed, it would have been a categorical denial of the contents of this last-minute, anomalous, telegraphed, unsworn pleading, for never at any time did Petitioner insist upon the Union's furnishing security for

its performance under any contract to be entered into. Even if the terms used by the lower court in its judgment (R. 61) be adopted, it must be seen that submitting a "proposal" is not "insisting", nor does making a "request" constitute "insisting". Yet the lower court finds no difficulty in holding in effect that regardless of how the subject was presented, the bare mention of a performance bond from the Union constituted, as a matter of law, bad faith bargaining and contempt of court. Such, it is respectfully submitted, cannot be the law. Congress has never written into the National Labor Relations Act any such provision making it *per se* bad faith or illegal to mention or submit a proposal for a performance bond from a union at a bargaining session, whether by way of demand or request.

(b) Said judgment of the lower court is in direct conflict with a decision rendered in the Fifth Circuit. *N.L.R.B. v. Taormina*, 244 F. 2d 197 (C.A. 5th, 1957), was a contempt proceeding instituted by the Board against an employer whom it charged with having insisted on a performance bond or other security as a condition to the entering into a contract with the Union. The record in the case and the court's opinion above cited show that such a proposal, together with another, had in fact been made, even if it had not been insisted upon as a condition precedent to a contract. Nothwithstanding this fact, the Court of Appeals for the Fifth Circuit disallowed and dismissed the contempt proceeding. Thus, the court declined to rule as a matter of law that mentioning or submitting a proposal for a performance bond from the union constituted bad faith bargaining.

4. Said judgment of the lower court is further clearly erroneous in not holding that both Respondent and the Union had accepted, ratified and approved said wage increases granted by Petitioner, and hence that they are now barred from claiming the same to have been unilaterally given.

(a) As hereinbefore stated the undisputed facts set forth in Petitioner's sworn Answer, (R. 31), show that at a meeting of Petitioner's representatives with representatives of the Union as bargaining agent for all employees, on August 16, 1960, Petitioner fully explained to the Union just what had been done with respect to the wage increases granted to a part of its employees on August 9, 1960, and further explained the reasons and necessity therefor. No dissent or objection whatever was offered or raised by the Union's representatives to the granting of said limited wage increases, so that Petitioner reasonably was led to believe that the same were accepted by the Union, and continued payment thereof. Petitioner continued in this belief until receipt, on or about September 10, 1960, of a copy of the "Charge" filed against it which led to the institution of this contempt proceeding. What brought about this change of mind on the part of the Union is not revealed.

(b) While the specific question appears not to have heretofore arisen, it must be the law that where a union, as bargaining agent for employees, agrees to a wage increase, it cannot later withdraw that acceptance, claim that the increase was unilaterally given by the employer, and procure prosecution of the employer on the ground of his having granted a unilateral wage increase.

It must also be the law that such acceptance can be given by a union either before or after the setting up

of the wage increase by the employer. If the union's assent comes before the wage increase is given, then surely such increase is not unilateral or subject to later objection on such ground. If the union's assent comes after the wage increase, by way of acceptance, ratification or approval, it must equally be true that such wage increase is not unilateral or subject to later objection on such ground. There is nothing in the National Labor Relations Act or in the case law thereunder that nullifies the basic rules of the law of ratification or of the acceptance of offers.

Such assent can be and here was, signified by silence and failure to object, when the parties were assembled for the very purpose of negotiating on wages, and were under duty to communicate with each other fairly, freely and honestly with respect to the subject of wages then under consideration. Such assent was further manifested by the conduct of the employees and their Union in accepting and collecting continued payment of such increased wages, without protest or objection. It has been specifically held that where an employer makes a unilateral wage modification, and employees show assent by conduct, such action ceases to be unilateral action by the employer, for it has thus become bilateral. *General Electric Co. v. Porter*, 208 F. 2d 805, 813 (Headnote 7) (C.A. 9th, 1953; cert. den. 347 U.S. 951, 975; 74 S. Ct. 676, 787; 98 L. Ed. 1097, 1115).

The scene here presented is nothing short of shocking to one's innate sense of justice, which shows a Union leading an employer reasonably to believe at a bargaining session that limited wage increases granted shortly theretofore were acceptable to the Union, as bargaining agent for all employees, only to have such increases used weeks

later as a basis for contempt proceedings instigated by the Union against the employer. The scene is rendered doubly shocking when it appears that the National Labor Relations Board, which acts as prosecutor on behalf of the Union in the contempt proceeding, has notified the employer that although it is to be punished for granting the wage increases in question, nevertheless the same are to remain unrevoked. (R. 33). The plain legal effect of such notification is ratification by the Board of the wage increases as granted, but nevertheless Petitioner is to be punished. This is indeed a strange spectacle in the administration of justice. Petitioner respectfully submits it is one that ought not to be allowed to stand.

CONCLUSION

1. *Burden of Proof.*

In a contempt proceeding the burden of proof rests upon the Board to establish the alleged offense. *N.L.R.B. v. Cleveland Trust Co.*, supra, at p. 99, citing numerous cases; *N.L.R.B. v. Little Rock Furniture Co.*, 123 F. 2d 868 (C.C.A. 8th, 1941).

This burden is a heavy one and calls for "clear and convincing proof" to meet it. *N.L.R.B. v. Standard Trouser Co.*, supra, at p. 1014.

This heavy burden is imposed doubtless because "contempt of court is indeed a very grave thing and we are not disposed to make strained and extreme construction of *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145, in order to spell out some theoretical and abstract violation of the Court's order, with facts such as are before us". *N.L.R.B. v. Standard Trouser Co.*, supra, at p. 1015.

Not only did Respondent in the case at bar fail to meet the burden resting upon it, but the undisputed facts affirmatively show no violation of the lower court's decree.

2. *Importance Of This Case.*

This is an important case, not alone to Petitioner which has been held in contempt of court and fined a substantial sum, but to the general public as well. It is impossible to read this Record without being impressed with the fact that here a Union has been playing a crafty game against an employer caught in a vicious situation where the Union would not allow a general wage increase, and without such wage increase the employer could not maintain an adequate labor force. Having the upper hand, the Union determined to exact its price, in the form of a "Union shop", even though it meant fighting increased wages for labor. Since the employer continued to resist, the game was played by the Union until it felt the time ripe for springing the trap, which was done by filing a "Charge" that would bring on a contempt proceeding, and at the last moment injecting into the record an allegation of bad faith bargaining based on facts which, if they existed, must have been known to the Union all along, but were withheld for use as a last-minute surprise tactic. For the protection of employers, laborers and the public at large, such abuse of the bargaining process, it is respectfully submitted, ought not to be tolerated.

For all of the foregoing reasons Petitioner respectfully submits that (1) writ of certiorari should issue to bring up for review the judgment herein of the Court of Appeals; (2) the judgment of the Court of Appeals should be reversed and set aside; (3) this contempt proceeding should be dismissed; and (4) the fine of $1,000.00 assessed

against it should be ordered repaid to it; for all of which relief Petitioner prays.

Respectfully submitted,

SCOTT TOOTHAKER
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McAllen, Texas
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PROOF OF SERVICE

I, Scott Toothaker, attorney for F. M. Reeves and Sons, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the_____day of March, 1961, I served copies of the foregoing Petition For A Writ of Certiorari on the several parties in interest, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C.

2. On the National Labor Relations Board, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Stuart Rothman, Esq., its Chief Counsel, at the office of said Board, Washington 25, D.C.

3. On the attorney of record for the National Labor Relations Board in the court below, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Marcel Mallet-Prevost, Esq., Assistant General Counsel, at the office of said Board, Washington 25, D.C.

SCOTT TOOTHAKER
Attorney for F. M. Reeves and Sons, Inc.
Address:
1630 North Tenth Street
McAllen, Texas

APPENDIX A

Order Adjudging Contempt

FILED
United States Court of Appeals
Tenth Circuit
January 19, 1961
Robert B. Cartwright, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before SAM G. BRATTON and JOHN C. PICKETT, United States Circuit Judges, and CARL A. HATCH, United States District Judge, assigned.

Number 6125

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

F. M. REEVES AND SONS, INC., *Respondent*

ORDER

This cause came on to be heard on petition of the National Labor Relations Board for an adjudication in civil contempt and for other relief. Allison W. Brown, Jr., appeared for the Petitioner, and Scott Toothaker appeared for Respondent, and was argued to the court.

ON CONSIDERATION WHEREOF: It is the order of the court based upon the record in the above-entitled cause and the statements of counsel; that the granting of the unilateral wage increase without consent of the

Union constituted contempt of this court; and that the performance bond proposal submitted on two occasions, whether characterized by counsel as a request or demand, amounted to a bar to negotiating in good faith and, thereby, constituted contempt of this court.

IT IS FURTHER ORDERED: That the punishment of Respondent, F. M. Reeves and Sons, Inc., for the above contempt which the court considers under the circumstances as a minimum is a fine of $1,000 for past acts of contempt.

IT IS FURTHER ORDERED: That the National Labor Relations Board's prayer for costs and for attorneys' fees in this cause be and the same is hereby denied.

Approved as to form:

/s/ ALLISON W. BROWN, JR.
Allison W. Brown, Jr.
For Petitioner.

/s/ SCOTT TOOTHAKER
Scott Toothaker
For Respondent

/s/ SAM G. BRATTON
Sam G. Bratton
U. S. Circuit Judge

/s/ JOHN C. PICKETT
John C. Pickett
United States Circuit Judge

/s/ CARL A. HATCH
Carl A. Hatch
U. S. District Judge

APPENDIX B

Decision and Order of N. L. R. B.

On February 28, 1958, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in unfair labor practices within the meaning of Section 8 (a) (5), and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, [1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

We agree with the Trial Examiner that the Respondent violated Sections 8 (a) (5) and (1) of the Act. In our opinion, the entire pattern of the Respondent's conduct demonstrates that the Respondent was not motivated by a good faith doubt of the Union's majority representative status in an appropriate unit when it declined to recognize and bargain with the Union and insisted on a Board-conducted election as condition precedent to bargaining with the Union. Thus, while it sought to defend its action on the grounds of lack of majority, we note that it did not

[1] Respondent's request for oral argument is hereby denied as the record and brief adequately set forth the facts and positions of the parties.

question the Union's majority at the time of request, but waited instead to raise the question for the first time at the hearing, and when it did so, it sought to bolster the alleged doubts with such untenable grounds [2] as: (1) the Union may have lacked a majority because 4 card signers were temporary employees; (2) the presence of representatives of the Operating Engineers at the meeting wherein the Union requested recognition raised the possibility that recognition might result in 8 (a) (2) charges; and (3) in any event, the Board would not assert jurisdiction over the Respondent. Further, in the interim and shortly after the request to bargain, in total disregard of the majority claim of the Union, the Respondent unilaterally granted a wage increase and other benefits.

From all this, we conclude that the refusal was merely a delaying tactic to gain time and take action to dissipate the Union's majority and win employee allegiance from the Union. Such conduct has heretofore been held to constitute a refusal to bargain in good faith. [3] We so find here.

Apart from the foregoing, we find, as did the Trial Examiner, that the Respondent violated Section 8 (a) (5) and (1) of the Act by unilaterally instituting wage increases and other employment benefits on September 5.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby

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[2] As to these grounds, it appears that the questioned employees were not temporary, except possibly one, and, therefore, even assuming one temporary employee, the Union still had a majority; the Operating Engineers made clear that they were not a rival union to the Teamsters; and the Board had asserted jurisdiction in F. M. Reeves and Sons, Inc., 112 NLRB 295 and the Respondent stipulated as to jurisdiction in the instant matter.

[3] A. L. Gilbert Company, 110 NLRB 2067, 2069; Harrisburg Building Units Co., Inc., 116 NLRB 334; and Traders Oil Company of Houston, 119 NLRB No. 109.

orders that Respondent, F. M. Reeves and Sons, Inc., Roswell, New Mexico, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargin with the Union as the exclusive representative of all of its employees in the unit found to be appropriate and set forth in the Intermediate Report with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Refusing to bargain with the Union, offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain or coerce its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a written agreement.

(b) Upon unconditional request, return any striker to his employment, discharging, if necessary, any replacement hired on or since September 5, 1957.

(c) Post at its plant in Roswell, New Mexico, copies of the notice attached hereto marked "Appendix".[4] Copies of the notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material,

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Dated, Washington, D.C., Oct. 13, 1958.

Boyd Leedom, *Chairman*
Stephen S. Bean, *Member*
John H. Fanning, *Member*
National Labor Relations Board

[Seal]

ORDER CORRECTING DECISION AND ORDER

On October 13, 1958, the Board issued a Decision and Order in the above-entitled proceeding in which there were inadvertent omissions.

It Is Hereby Ordered that the said Decision and Order be, and it hereby is, corrected as follows:

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[4] In the event that this Order is enforced by decree of a United States Court of Appeals there shall be substituted for the words "Pursuant To A Decision And Order" the words "Pursuant To A Decree Of The United States Court of Appeals Enforcing An Order."

1. By inserting the word "by' between the words "union," and "offering" in the first line of paragraph 1. (b) on page 3; and

2. By inserting the word "or" between the words "Union" and "in" in line 3 of the second full paragraph of the Appendix.

It Is Further Ordered that the said Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D.C., February 5, 1959.

By direction of the Board:

Frank M. Kleiler
Executive Secretary

APPENDIX C

Opinion Granting Enforcement of N. L. R. B. Order

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6125 — November Term, 1959

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. M. REEVES AND SONS, INC., *Respondent*

On Petition for Enforcement
of an Order of the
National Labor Relations Board

(December 17, 1959)

Fannie M. Boyls, Attorney, NLRB (Stuart Rothman, Gen. Counsel, Thomas J. McDermott, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Ass't Gen. Counsel, and Arthur C. Katims, Attorney, NLRB, with her on the brief), for Petitioner.

Scott Toothaker, McAllen, Texas, (Ewers, Toothaker, Ewers, Elick, Jones & Abbott, of counsel), for Respondent.

Before BRATTON, PICKETT and BREITENSTEIN, Circuit Judges.

PICKETT, Circuit Judge.

In this proceeding the National Labor Relations Board seeks enforcement of its order requiring F. M. Reeves and Sons, Inc., herein referred to as "respondent," to bargain

with Local Union No. 492 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in an appropriate unit, to cease and desist from unilaterally offering wage increases or other employee benefits, and also upon unconditional request to return any striking employee to his employment. The order was based on the Board's conclusion that respondent had committed an unfair labor practices proscribed by Sections 8 (a) (1) and (5) of the National Labor Relations Act, 29 U.S.C.A. §158 (a) (1) and (5).[1]

At the outset, it is necessary to consider respondent's contention that the Board's self-limiting jurisdictional standards made the assertion of jurisdiction improper in this case. To better effectuate the purposes of the Act and to promote the prompt disposition of major cases, the Board has from time to time established these standards in

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[1] The Trial Examiner found:

"Respondent is a Texas corporation with its principal office and place of business at Hobbs, Texas. In Roswell, New Mexico, it is engaged in the business of mining and supplying sand, gravel, concrete aggregate, and ready-mixed concrete to building contractors. In the 12-month period preceding the issuance of the complaint, the Respondent sold goods and materials valued in excess of $100,000 to certain contractors performing services at Walker Air Force Base, Roswell, New Mexico. All of these sales appear to have been made to subcontractors performing work on the base. About $73,000 was billed to them as a result of materials supplied under formal contract and about $39,000 on purchases arranged less formally. Considering that the Respondent in the period mentioned supplied goods and services having a value in excess of $100,000 to organizations performing work on a National Defense installation, I conclude that the Board's jurisdictional criterion in that respect is satisfied. Although the assertion was made that the period here considered is not a representative one, no substantial evidence to support that position was offered."

(Footnotes omitted). With some additions, the Board adopted the Examiner's findings, conclusions and recommendations.

order to reflect its policy of handling only cases having significant impact on interstate commerce. See *Guss v. Utah Labor Board*, 353 U.S. 1; Maytag Aircraft Corp., 110 N.L.R.B. 594. Although the Board had held in Westport Moving and Storage Co., 91 N.L.R.B. 902, that jurisdiction would be asserted over "enterprises which substantially affect the national defense," that principle was restricted in *Maytag Aircraft Corp.*, supra, wherein it was announced that thereafter jurisdiction would be asserted "over enterprises of this type only if they are engaged in providing goods or services directly related to national defense pursuant to Government contracts, including subcontracts, in the amount of $100,000 or more a year." The latter standard was in effect when the complained-of practices were committed. [2] The Trial Examiner concluded that this standard was satisfied by respondent's activity which included furnishing approximately $112,000 worth of goods and services during the year preceding the issuance of the complaint to organizations performing work on the Walker Air Force Base. When the activities of the employer have sufficient impact on interstate commerce to invoke the jurisdiction of the Board, it has, in most cases, discretionary authority in deciding the extent to which it will exercise its jurisdictional power. *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675; *Guss v. Utah Labor Board*, supra. But see *Office Employees International Union v. N. L. R. B.*, 353 U.S. 313. We find no merit to respondent's contention that sales which constitute the $112,000 amount were not such as to bring respondent within the criteria established by the Maytag case. The evidence is clear that all the material

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2. On October 2, 1958 the Board re-adopted the standard announced in the Westport case. 42 L.R.R.M. 96-97.

in question was furnished to and was used by contractors for construction required by government contracts in connection with a National defense project at Walker Air Force Base. It is immaterial that some of the material may have been used to construct recreational facilities on the base. The Board was satisfied that the jurisdictional requirements were present, and we agree.

Respondent relies on *N.L.R.B. v. Guy F. Atkinson Co.*, 9 Cir., 195 F. 2d 141, in support of its contention that the Board abused its discretion by asserting jurisdiction under conditions which did not meet the Maytag standard. This reliance is misplaced. In the Atkinson case the Board had refused, for many years, to assert jurisdiction over the operations of the employer. The Board then changed its policy and assumed jurisdiction over various unfair labor practices which had occurred before the policy change. The court refused to enforce that part of the Board's order that referred to conduct completed before the later policy was in effect. Here there was no basis for such reliance by the respondent. In a 1955 representation case, jurisdiction was asserted over this same organization, the Board having concluded that the jurisdictional facts almost identical to those in this case satisfied the Maytag standard. It was there said:

> "The Employer contends the Board should not assert jurisdiction over its Roswell operation in the light of *F. M. Reeves and Sons, Inc.*, 111 N.L.R.B. 186, wherein the Board dismissed a representation petition because the Employer's operations did not meet its jurisdiction standards. The record now before the Board shows the Employer's Roswell operation sold, under contract, materials valued at about $110,000 to contractors performing work at a military installation, the Walker Air Force Base * * *" F. M. Reeves and Sons, Inc., 112 N.L.R.B., footnote 1.

Under the particular facts of this case the Board did not act unfairly or in abuse of its discretion by asserting jurisdiction over respondent. See *N. L. R. B. v. Jones Lumber Co.*, 9 Cir., 245 F. 2d 388; *N. L. R. B. v. Parran*, 4 Cir., 237 F. 2d 373; *Optical Workers' Union v. N. L. R. B.*, 5 Cir., 229 F. 2d 170, cert. denied 351 U.S. 963; *N. L. R. B. v. Stoller*, 9 Cir., 207 F. 2d 305, cert. denied 347 U.S. 919.

With respect to the merits of the petition for enforcement, the only question is whether substantial evidence appears in the record, considered as a whole, to support the conclusion that unfair labor practices were committed. *N. L. R. B. v. Hamilton*, 10 Cir., 220 F. 2d 492; *Atlas Life Ins. Co. v. N. L. R. B.*, 10 Cir., 195 F. 2d 136; *N. L. R. B. v. Stewart*, 5 Cir., 207 F. 2d 8. The record discloses that respondent, a Texas corporation, operates a ready mixed concrete, rock, sand and gravel business in Roswell, New Mexico. On August 27, 1957 a meeting was held between management representatives Morris Trent and T. T. Sanders, and labor representatives Faro Caudill of the Teamsters, James Price of the New Mexico Building and Construction Trades Council, and two other men representing the International Union of Operating Engineers, Local 953. Caudill requested respondent's recognition of the Teamsters Local, stating that a majority of respondent's employees had designated that union to be their bargaining representative. Although Caudill had in his possession the signed membership cards, neither Sanders nor Trent inquired as to the exact number of cards or asked to examine them. While there was a conflict in the evidence as to whether the cards were actually physically offered to Sanders and Trent, it is abundantly clear that Caudill proposed that the cards be turned over to a neutral party who could then determine by referring to respond-

ent's payroll whether a majority of the employees had signed cards. This proposal was rejected. During the course of the meeting there was some discussion concerning the fact that several of the employees were temporary and it apparently was agreed that the number of employees in the appropriate bargaining unit would have to be determined without reference to those temporary employees. Because the meeting was held for the purpose of considering the Teamsters' request for recognition, some doubt was expressed by Sanders and Trent as to the reason for the presence of two representatives of the Operating Engineers Union. There was substantial evidence to the effect that the Operating Engineers Union was only interested in advancing the Teamsters' bid for recognition and that it was not a rival union. The evidence convincingly shows that the decision not to recognize or bargain with the Teamsters Union was in a large part made because of the expectancy that the Board would not assert jurisdiction over the dispute rather than because of a doubt as to the majority status of the union. On September 5, 1957, several days after the meeting, eleven of respondent's employees staged a strike protesting their employer's refusal to recognize their representative. On the first day of the strike, Trent informed the employees not participating in the strike that a 25¢ per hour wage increase was to be put into effect immediately and, in addition, promised increased vacation time and the possibility of more regular working hours.

It was stipulated by the parties that twelve employees had signed cards by August 27. In addition, the Trial Examiner found that there were twenty-four employees working for respondent on that date but that only twenty-one of them performed the type of work that would make

their inclusion in the bargaining unit appropriate.[3] On these record facts it was concluded that Sections 8(a)(5) and (1) of the National Labor Relations Act were violated both by respondent's refusal to recognize and bargain with the union and by the unilateral grant of employee benefits.

An employer's refusal to bargain is an unfair labor practice when it appears that a union has been designated by a majority of employees in an appropriate unit and that the refusal is without good faith. *N. L. R. B. v. Hamilton*, supra; *N. L. R. B. v. Clearfield Cheese Co.*, 3 Cir., 213 F. 2d 70; *N. L. R. B. v. Lunder Shoe Corp.*, 1 Cir., 211 F. 2d 284. There is little room for argument as to the evidentiary support for the first requirement. Concededly twelve employees had signed cards. Although the Trial Examiner concluded that one of the card-signers who ordinarily would have been included in the unit was a temporary employee and therefore not to be recognized in determining whether a majority existed, the proper calculation still was eleven union members out of the twenty-employee baragining unit. But respondent contends that an additional three card-signers were temporary employees. Although these three had initially worked on a temporary project for respondent, they were employed on August 27 in the performance of duties incident to the regular conduct of respondent's business. Substantial evidence shows that the required majority existed at the time when respondent refused to recognize the union.

Neither is there merit to respondent's contention that its refusal to bargain was made in good faith. There is nothing to indicate that either Trent or Sanders enter-

[3] The test for determining which of the employees were to be included in the unit was established by the Board in 1955, F. M. Reeves and Sons, Inc., 112 N.L.R.B. 295.

tained a doubt as to the existence of a majority. To the contrary, there is evidence that Sanders expressed the view that he did not doubt the truth of the assertion that a majority of the employees had designated the union. It is also argued that the knowledge that possibly four of the employees were temporary and therefore not to be considered in determining the existence of a majority furnished a basis for a good-faith doubt by respondent's representatives. This suggestion is untenable for the reason that the record fails to disclose that either Trent or Sanders knew that these four employees had signed cards or that a majority would not exist without their inclusion. The respondent also attempts to excuse itself for its failure to recognize the union and bargain with it because there were present at the meeting representatives of another union. It is urged that because of this, respondent's representatives were put in a position of not knowing which of the two unions to deal with. But whatever the relation between the two unions may have been, it is certain that the representatives of the Operating Engineers Union were making no attempt to interfere with the Teamsters' bid for recognition, and that the respondent's representatives must have known from what was said at the meeting that recognition was sought by only one union.[4]

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[4] In connection with these contentions, the Board concluded:

"We agree with the Trial Examiner that the Respondent violated Sections 8(a)(5) and (1) of the Act. In our opinion, the entire pattern of the Respondent's conduct demonstrates that the Respondent was not motivated by a good faith doubt of the Union's majority representative status in an appropriate unit when it declined to recognize and bargain with the Union and insisted on a Board conducted election as condition precedent to bargaining with the Union. Thus while it sought to defend its action on the grounds of lack of majority, we note that it did not question the Union's majority, at the time of request, but waited instead to raise the question for the first time at the hearing, and when it did so, it sought to bolster the alleged doubts with such

The Board also concluded that the unilateral offering of wage increases and other employee benefits constituted a violation of the same two sections, and part of the Board's order is directed specifically to this phase of respondent's conduct. Of course the granting of the employee benefits appears to have constituted a violation of Section 8(a)(1), and coming as it did at a time when respondent was refusing to bargain with the union, it also would seem clear that Section 8(a)(5) was thereby violated. But respondent contends that the decision to grant the benefits, or at least the wage increases, was arrived at during the preceding spring when union pressures were not being felt. However, there is adequate support from the record, considered as a whole, for the Board's inference that the announcement on the opening day of the strike that there would be increased benefits violated the two unfair labor practice sections. *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217; *May Department Stores Co. v. N. L. R. B.*, 326 U.S. 376; *N. L. R. B. v. Burton-Dixie Corp.*, 10 Cir., 210 F. 2d 199; *N. L. R. B. v. Valley Broadcasting Co.*, 6 Cir., 189 F. 2d 582; and see *N. L. R. B. v. Browning*, 10 Cir., 268 F. 2d 938.

The order will be enforced.

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untenable grounds as: (1) the Union may have lacked a majority because 4 card signers were temporary employees; (2) the presence of representatives of the Operating Engineers at the meeting wherein the Union requested recognition raised the possibility that recognition might result in 8(a)(2) charges; and (3) in any event, the Board would not assert jurisdiction over the Respondent. Further, in the interim and shorly after the request to bargain, in total disregard of the majority claim of the Union, the Respondent unilaterally granted a wage increase and other benefits.

From all this, we conclude that the refusal was merely a delaying tactic to gain time and take action to dissipate the Union's majority and win employee allegiance from the Union. Such conduct has heretofore been held to constitute a refusal to bargain in good faith. We so find here." (Footnotes omitted).

APPENDIX D

Enforcement Decree

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of
Appeals - Tenth Circuit
Jan 18 1960
Robert B Cartwright
Clerk

Number 6125

NATIONAL LABOR RELATIONS BOARD, Petitioner, §
v. §
F. M. REEVES AND SONS, INC., Respondent. §

DECREE

Before: Bratton, Pickett and Breitenstein, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent F. M. Reeves and Sons, Inc., on October 13, 1958. The Court heard argument of respective counsel on September 11, 1959, and has considered the briefs and transcript of record filed in this cause. On December 17, 1959, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and

that F. M. Reeves and Sons, Inc., its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

/s/ Sam G. Bratton
Judge, United States Court of Appeals for the Tenth Circuit

Dated: January 18, 1960.

FILE COPY

Office Supreme Court, U.S.
FILED
APR 19 1961
JAMES R. BROWNING, Clerk

No. 831

In the Supreme Court of the United States

OCTOBER TERM, 1960

F. M. REEVES AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX
Solicitor General
Department of Justice,
Washington 25, D. C.

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National Labor Relations Board,
Washington 25, D. C.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The grounds for the order of the court of appeals adjudging petitioner in civil contempt are stated therein (Pet. 21-22.) The court's original opinion enforcing the Board's order (Pet. 28-36) is reported at 273 F. 2d 710. The Board's decision and order (Pet. 23-27) are reported at 121 NLRB 1280.

JURISDICTION

The order of the court of appeals adjudging petitioner in civil contempt was entered on January 19, 1961 (Pet. 21-22). The petition for a writ of certiorari was filed on March 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly found that petitioner had contumaciously disobeyed the court's

order to bargain collectively with the union as the exclusive representative of its employees, by granting unilateral wage increases to the employees and by insisting on a performance bond from the union as a condition of entering into a collective bargaining agreement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth below:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in section 8(a)(3).
>
> Sec. 8(a) It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . .
>
> . . . . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *

* * * * *

STATEMENT

On October 13, 1958, the Board, in an unfair labor practice proceeding under Section 10 of the Act, issued its Decision and Order against petitioner. The Board found that petitioner, in violation of Section 8(a) (5) and (1) of the Act, had refused to recognize or bargain with the Union[1] which petitioner's employees had designated as their exclusive bargaining representative, and in disregard of the Union's representative status had unilaterally granted a wage increase and other benefits to the employees (Pet. 25). *F. M. Reeves and Sons, Inc.*, 121 NLRB 1280. The Board's order, in relevant part, directed petitioner to cease and desist from refusing to bargain with the Union as the representative of the employees, and from offering wage increases and other employment benefits to the em-

[1] Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

ployees "in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union * * *" (Pet. 25). On December 17, 1959, the court below upheld the Board's findings and on January 18, 1960, entered a decree enforcing the Board's order in full (Pet. 28-38). 272 F. 2d 710.

On November 3, 1960, the Board filed a petition in the court below to have petitioner adjudged in civil contempt for disobedience of the court's decree (*infra*, p. 12).[2] Petitioner filed an answer denying that it had violated the decree (*infra*, p. 20). Thereafter the Board requested the court below for leave to amend its petition by adding a further allegation with respect to petitioner's disobedience of the decree (*infra*, p. 31). Petitioner filed a further answer objecting to the Board's motion to amend its petition (*infra*, p. 32). The court granted leave to amend the petition and entertained the petition as amended (Tr. of Proceedings, p. 8).

In substance, the facts as set forth in the petition as amended, petitioner's answers thereto, and the statements of counsel made in open court are as follows:

Following entry of the decree, petitioner and the Union opened contract negotiations (Pet. 5). By August 1960 both parties had submitted contract proposals and some agreement had been reached, but a number of issues, including wages, were still unresolved (Br.

[2] The relevant papers are set forth in the Appendix, pp. 12-30 *infra*. We have also lodged with the Clerk of the Court a transcript of the proceedings in the court below on the contempt petition, January 19, 1961.

Pet. Contempt Adj., par. III 2; Pet.'s Answer, par. I). On August 2, the Union telegraphed petitioner, requesting a meeting on August 10-12 in Roswell, New Mexico, where petitioner's plant is located. Counsel for petitioner replied by letter the same day, excusing himself from meetings on the proposed dates because of prior commitments, and referring to his understanding that the Union was to submit counter proposals if it was unwilling to accept certain terms proposed and discussed at the last negotiation meeting. The letter concluded (*infra*, pp. 17-18):

> In regard to wages, it is my recollection that you were going to contact the Albuquerque Sand and Gravel Company and ascertain what wages were being paid by that company, and that the rates being paid by that company might have a bearing on the rates that could be paid by our client. We have again discussed with management the matter of wages, and it would be willing to institute a wage increase at this time to the following rates:
>
> [Wages scale specified]
>
> We would appreciate it very much if you would let us have the wages being paid by Albuquerque Sand and Gravel Company if this information is available to you. We would also like to have any counter proposals you or the employees would care to make, so we can study them before we come to Roswell.

Upon receiving this letter, the Union telegraphed petitioner requesting meetings on August 15-17. Peti-

tioner answered on August 5, agreeing to meet with the Union at Roswell on August 16 (Bd.'s Pet. Contempt Adj., par. III 3; Pet.'s Answer, pars. V, IX, pp. 2, 7). On August 9, petitioner, without notice to the Union, instituted certain wage increases, retroactive to August 1 and differing from the wage scale proposed as a basis for negotiation in petitioner's letter of August 2 (Pet.'s Answer, par. IX, pp. 6-7).

The negotiating meeting was held as scheduled on August 16. At that time, petitioner notified the Union of the wage increases which had already gone into effect (Pet. 15). On September 10, 1960, the Union filed charges with the Board alleging that petitioner's unilateral action violated the Act (Pet. Ans. par. IX, p. 7).

On December 7, petitioner reiterated the demand made in its first contract proposal over six months earlier that the Union execute a $25,000 contract performance bond. Article 8 of petitioner's last contract proposal in December provided, in terms identical to article 8 of its first proposal in April:

> The Union shall execute and deliver to the Company a performance bond with a recognized surety company, authorized to do business in the State of New Mexico, in the principal amount of twenty-five thousand dollars ($25,000.00), and which bond shall be payable to the Company and conditioned that the Union shall perform all of the duties and obligations provided for in this Agreement.

Moreover, during the course of the proceedings in the court below, petitioner asserted that, while it was

not demanding any particular form of performance bond, it would nevertheless "insist" on "some form of security" from the Union as a condition of entering into a collective bargaining agreement." (Tr. of Proceedings 66-67; 17, 60, 65-66, 69-70).[3]

On these facts the court below adjudged petitioner to be in contempt of court, finding "that the granting of the unilateral wage increase without the consent of the Union constituted contempt of this court; and that the performance bond proposal submitted on two occasions, whether characterized by counsel as a request or demand, amounted to a bar to negotiating in good faith and thereby constituted contempt of this court" (Pet. 21-22). The court ordered petitioner to pay a fine of $1,000 (Pet. 22).

ARGUMENT

1. It is settled that "an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the

[3] The following colloquy occurred between the court and counsel for petitioner (Tr. of Proceedings 66-67, 70):

Judge Beaton. . . . You say you will not require performance bond. What about other security?

Mr. Toothaker. I think we will not require some other security.

Judge Beaton. You will?

Mr. Toothaker. I think we will, yes, any one form of security, one form of reasonable security.

. . . . . .

Judge Hatch. . . . Now you have told us you may not require a bond but you will insist . . . that you have reasonable security of some kind. That is your position, or is it? I just want to be sure.

Mr. Toothaker. Yes . . . we feel that they should come to us with one form or a reasonable offer of security.

Judge Hatch. And you insist on it?

Mr. Toothaker. I think we are going to insist on it.

employees in matters of this nature, and hence has been condemned as a practice violative of the statutory provision" to bargain collectively in good faith. *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 484-485; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 223-225; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 384-385. The decision below with respect to petitioner's unilateral wage increase is in accord with this controlling principle, and was amply justified by the factual showing made before the court of appeals. The petition for certiorari appears to be based principally on the contention that there was insufficient basis in fact for a finding that petitioner's action amounted to a contempt of the court. This contention, we submit, presents no grounds for review by this Court.

Petitioner seeks to excuse its unilateral wage increase on the ground that it was not granted with a view to undermining the Union's representative status but "out of business and economic necessity" and only after the Union had indicated an unwillingness "to consider a necessary general wage increase except on terms Petitioner could not accept" (Pet. 9, 10). Petitioner's asserted justification is an obvious afterthought and is belied by its letter of August 2 to the Union (*supra*, p. 5). Nothing in this letter suggests that petitioner and the Union had reached an impasse on wages in their negotiations or that business considerations required immediate action with respect to wages. On the contrary, petitioner requested the Union to submit information concerning the wages paid by a competitor

and invited it to submit "any counter proposals you or the employees would care to make so we can study them before we come to Roswell" (*supra*, p. 5). Thereafter petitioner agreed to meet with the Union on August 16. Nevertheless, seven days before the scheduled meeting, petitioner without any further notice to the Union instituted wage increases which in some respects differed from those which it had proposed in the August 2 letter. In this context the court below could well conclude, as it did, that petitioner's post-decree unilateral action was indistinguishable legally from the unilateral action which had led to the entry of the decree specifically enjoining such conduct.

Even less substantial is petitioner's further assertion that the Union must be deemed to have "ratified" petitioner's illegal conduct since it failed to protest the unilateral wage increase when it learned of it. The short answer to this contention is that the Union did not acquiesce in petitioner's action but filed charges with the Board complaining about it (Pet. 15) and it was on the basis of those charges that the Board instituted contempt proceedings.[1]

2. Petitioner also challenges the factual basis for the finding below that its insistence on a performance bond as a condition of entering into a collective bargaining agreement "amounted to a bar to negotiating in good

[1] Petitioner's suggestion that the Board itself also "ratified" its illegal conduct is frivolous. The Board normally does not require an employer to revoke wage increases made unilaterally in derogation of a union's representative status; it issues a cease and desist order to guard against a repetition of such illegal conduct. Obviously, the circumstance that in the instant case the Board consistent with its practice did not seek to require petitioner to revoke the wage increases can in no one's mind be deemed to constitute approval of petitioner's misconduct.

faith and, thereby, constituted contempt of this court." (Pet. 22a.) This contention, depending as it does on an appraisal of the particular circumstances, presents no question warranting further review. As already shown (Statement, pp. 6-7, *supra*), there is ample basis for the court's finding and conclusion. Cf. *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349.[5]

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[5] Accord: *Tower Hosiery Mills, Inc.*, 81 NLRB 658, 661 enforced, 180 F.2d 701, 704, 705 (C.A. 4); *Amory Garment Co., Inc.*, 80 NLRB 182, 193-194 enforced, 24 LRRM 2274 (C.A. 5); *Tawmina Company*, 94 NLRB 884, 885, note 3, 900-901, enforced, 207 F. 2d 251 (C.A. 5); *Standard Generator Service Company*, 90 NLRB 790, 790-791, 800, enforced, 186 F. 2d 606 (C.A. 8); *Ozark Dam Constructors et al.*, 86 NLRB 520, 521, 532, enforced, 180 F. 2d 222 (C.A. 8). Cf. *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 841, 842 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F.2d 634 (C.A. 5). For a critical commentary, see Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1410, note 36 (1958).

Petitioner's assertion (Pet. 14) that the decision below is in conflict with *National Labor Relations Board* v. *Tawmina*, 254 F. 2d 197 (C.A. 5), is wide of the mark. That decision antedates this Court's ruling in *Borg-Warner*, *supra*. Moreover, the employer there, unlike petitioner here, expressed a "willingness now and in the future to continue the bargaining without insisting on [the union's execution of a performance bond] . . . as a prerequisite" (244 F. 2d at 197-198), and no doubt this avowed willingness prompted the court to dismiss the contempt proceeding. The Fifth Circuit did not suggest that the employer could lawfully insist on a performance bond as a condition of arriving at a collective bargaining agreement. On the contrary, the court's original decree enforced a Board order and decision holding that the employer's insistence on a performance bond constituted a violation of the good faith bargaining obligation. 94 NLRB 884, 900-901, enforced, 207 F. 2d 251 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labo. Relations Board.

APRIL 1961.

APPENDIX

1. Petition for Contempt

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

The National Labor Relations Board (herein called the Board) respectfully petitions this Court to adjudge respondent F. M. Reeves and Sons, Inc., its officers and agents, in civil contempt of this Court for violating, disobeying and refusing to comply with, the decree of this Court entered herein on January 18, 1960, and for other civil relief.

In support of its petition, the Board, upon information and belief, alleges as follows:

1. On January 18, 1960, this Court entered its decree herein enforcing a Board order issued against respondent, its officers, agents, successors, and assigns.

II. In pertinent part, the order of the Board, as enforced by said decree, directs that respondent:

1. Cease and desist from:

(a) Refusing to bargain with the Union as the exclusive representative of all of its employees in the unit found to be appropriate . . . with respect to rates af pay, wages. . . .

(b) Refusing to bargain with the Union by offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain, or coerce its employees in the exercise of their right to self-organization. . . .

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate, with respect to rates of pay, wages. . . .

II. The said decree has been in full force and effect since its entry and, at all times material herein, respondent has had full knowledge of its terms.

III. Respondent has violated, disobeyed and refused to comply with, the said decree in that since entry thereof respondent has unilaterally granted wage increases to over half the employees in the bargaining unit. More particularly, the Board shows this Court as follows:

1. Following entry of the Court's decree, respondent has engaged in collective bargaining negotiations with

Chauffeurs, Teamsters and Helpers and Helpers Local No. 492, affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the union).

2. In the course of said negotiations, on August 2, 1960, respondent sent the union a letter concerning wage rates, one of a number of subjects on which there had not been any agreement. Said letter set forth wage rates which respondent stated it would be willing to pay, and respondent asked the union to submit counter proposals before the next bargaining session. The wage rates were stated in the form of a proposal and the union was requested to obtain comparative employee rates for another company in the same type of business (Respondent's letter of August 2, 1960 to the union is attached hereto as an exhibit).

3. Upon receipt of said letter, the union wired respondent requesting negotiating meetings on August 16, 17 and 18. Respondent replied, under date of August 5, that it would meet with the Union on August 16.

4. On August 9, respondent instituted wage increases ranging from 5 to 25 cents an hour for 22 of the 52 employees in the bargaining unit. Said increases were made retroactive to August 1. Not all of the increases were in the same amounts as those set forth in the August 2 letter, and respondent did not notify the union of the revised rates put into effect.

5. The union did not learn until August 16, at the time of the bargaining session, that respondent had instituted the wage increases on August 9.

IV. By failing to bargain collectively in good faith with the union, and by granting unilateral wage increases to its employees in the manner set forth in paragraph III and its subparagraphs, respondent has violated, disobeyed, and refused to comply with, the

decree of this Court. Thereby, respondent has been, is, and continues to be, in civil contempt of this Court.

WHEREFORE the Board respectfully prays:

1. That this Court issue an order requiring respondent to file and serve, by a day certain, a sworn answer to the allegations of this petition specifically admitting or denying, or meeting by affirmative defense, each and every allegation of the petition.

2. That this Court issue an order requiring respondent to appear before it, at a time and place to be fixed by the Court, and then and there show cause, if any there be, why respondent should not be adjudged in civil contempt for violating, disobeying, and refusing to comply with, the decree of this Court.

3. That, upon the return of the order to show cause, respondent be adjudged in civil contempt of this Court.

4. That, upon such adjudication, the Court enter an order requiring respondent to purge itself of such civil contempt by:

(a) Fully complying with and obeying paragraphs 1(a) and (b) and 2(a) of the Board's order as enforced by this Court's decree of January 18, 1960.

(b) Refraining in the future from granting unilateral wages increases to its employees in derogation of the Union's status as bargaining representative.

(c) Immediately posting in conspicuous places, including all places where notices to employees are customarily posted, for a period of at least sixty (60) consecutive days, copies of an appropriate notice, to be signed by respondent, and stating that respondent has been adjudged in civil contempt of this Court for violating, disobeying, and refusing to comply with, said decree and that respondent will take action in purgation as ordered by the Court, such notices to be maintained in clearly legible condition throughout the posting period.

(d) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Sixteenth Region of the Board within fifteen (15) days after entry of the order of adjudication showing the steps taken by respondent to comply with the Court's directions, and filing further sworn statements on the first and fifteenth of each month thereafter as to the manner of respondent's bargaining with the union until the Court, by further order, determines that respondent has discharged its obligation to bargain collectively with the union.

(e) Paying to the Board all costs and expenditures, including counsel fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

5. That, upon respondent's failure to so purge itself of contempt, this Court issue attachments against it.

6. That the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to make effective its decree, and as this proceeding in civil contempt may require.

Dated at Washington, D. C., this 3rd day of November, 1960.

NATIONAL LABOR RELATIONS BOARD,
By MARCEL MALLET-PREVOST,
Assistant General Counsel.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
VIVIAN ASPLUND,
Attorneys.

EXHIBIT

EWERS, TOOTHAKER, EWERS, ELICK, JONES & ABBOTT
Attorneys at Law
1630 North Tenth Street
McAllen, Texas
P. O. Box 3667

August 2, 1960

Mr. Faro Caudill, Secretary-Treasurer,
Chauffeurs, Teamsters and Helpers Local No. 492,
216-A Iron, SW,
Albuquerque, New Mexico.

Re: F. M. Reeves and Sons, Inc., Roswell, New Mexico

DEAR MR. CAUDILL:

I acknowledge your telegram of this date requesting a meeting on the 10th, 11th and 12th of August in Roswell in regard to the above matter. I tried to reach you by phone yesterday but was advised by your office that you were out and would call me this morning. It will be impossible for me to be in Roswell on the dates you mentioned inasmuch I have a case set here before the NLRB on August 10 that will take four or five days to try. I have requested a postponement in this case but it has been denied; consequently, I will have to be here and proceed to trial.

Replying to your letter of July 21, the requests contained therein, if our notes are correct, are no different than the requests urged by you at our last meeting in Roswell on June 28. We understood that if the employees of the plant were not willing to accept the proposals we had previously discussed, they would recommend and you would submit counter proposals that the company could consider.

In regard to wages, it is my recollection that you were going to contact the Albuquerque Sand and Gravel Company and ascertain what wages were being paid by that company, and that the rates being paid by that company might have a bearing on the rates that could be paid by our client. We have again discussed with management the matter of wages, and it would be willing to institute a wage increase at this time to the following rates:

Transit Mix Drivers	$1.90 hr.
Dump truck drivers	1.85 "
Euclid drivers	1.75 "
Crusher operators	2.00 "
Caterpillar dozers	2.00 "
Crane operators	2.00 "
Loader operators	2.00 "
Mechanics	2.25 "
Welders	2.10 "
Laborers	1.40 "

We would appreciate it very much if you would let us have the wages being paid by Albuquerque Sand and Gravel Company if this information is available to you. We would also like to have any counter proposals you or the employees would care to make so we can study them before we come to Roswell.

Yours very truly,

ST:vo SCOTT TOOTHAKER.

CITY OF WASHINGTON,
District of Columbia, ss:

MARCEL MALLET-PREVOST, being duly sworn, deposes and says that he is Assistant General Counsel for the National Labor Relations Board; that he is authorized to execute and file the foregoing petition; that he has

read the petition and knows the contents thereof and that the statements therein made upon personal knowledge are true and that those made upon information and belief he believes to be true.

MARCEL MALLET-PREVOST,
Assistant General Counsel.

Sworn and subscribed to before me this 3rd day of November, 1960.

RUSSELL NEWLEN,
Notary Public,
District of Columbia.

My commission expires June 14, 1962.

2. *Answer to Contempt Petition*

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

RESPONDENT'S ANSWER TO PETITION FOR ADJUDICATION IN CIVIL CONTEMPT

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

The Respondent, F. M. REEVES AND SONS, INC., for answer to the petition filed against it herein, respectfully shows to the Court as follows:

I

It admits the averments of Paragraphs I and II.

II

It unqualifiedly denies the averments of the first sentence of Paragraph III, wherein it is alleged that Respondent has violated, disobeyed and refused to comply with the decree of this Court entered on January 18, 1960. Respondent likewise denies the further averment of said first sentence which charges that Respondent had unilaterally "granted wage increases to over half the employees in the bargaining unit." The gross and reckless exaggeration of this sworn statement by Petitioner is disclosed on the face of the Petition itself in Paragraph II, 4, where it is specifically averred that "Respondent instituted wage increases. . . .

for 22 of the 52 employees in the bargaining unit." The true facts showing the even smaller number of employees affected by the small raises granted in August, 1960, and the business and economic necessity for the granting thereof, are as hereinafter set out in Paragraph IX of this Answer.

III

It admits the averments of Paragraph III, 1, and shows to the Court that ever since the entry of said decree, Respondent has bargained or stood ready to bargain, in good faith with the union named.

IV

It admits addressing to said union the letter dated August 2, 1960, referred to in Paragraph III, 2, copy of which is attached as an exhibit thereto. Said letter speaks for itself with respect to its contents, rather than does Petitioner's interpretation thereof, hence Respondent relies upon the letter itself.

V

It admits the averments of Paragraph III, 3; but relies upon the written communications themselves, which are referred to, for the contents and meaning thereof.

VI

It admits, as averred in Paragraph III, 4, that on August 9, 1960, it instituted certain wage increases which were made retroactive to August 1, 1960, for the reasons and in the circumstances hereinafter fully explained. Said wage increases covered only a small portion of Respondent's employees and ranged from five cents to fifteen cents per hour. It denies that said wage increases were, or were intended to operate, in

derogation of the union's status or were made in an attempt to win employee allegiance from the union, or were intended or did operate, to interfere with, restrain or coerce respondent's employees in the exercise of their right to self-organization.

VII

It has no knowledge as to the date on which said union first learned of the wage increases referred to in Paragraph III, 5, and hence cannot admit or deny the averment of said Paragraph. Respondent can and does state, however, that in no way did it conceal or attempt to conceal the putting of such wage increases into effect, which increases were applied to only a small group of its employees, and were made out of business necessity as hereinafter set out.

VIII

It emphatically denies the averments of Paragraph IV which charge that Respondent failed to bargain collectively in good faith with said union, and that said wage increases constituted a violation or a disobeying of, or a refusal to comply with, said decree of this Court, as will be more particularly hereinafter shown. Most emphatically does Respondent deny that it at any time has been, is now, or continues to be, in civil contempt of this Honorable Court.

IX

And now further answering said petition, and in order that the Court may be fully apprised of the true facts showing the utter groundlessness of said petition, Respondent would show that:

On or about December 12, 1958, ownership, control and management of Respondent, F. M. Reeves And Sons, Inc., passed from its former owners and into the hands of its present new and entirely different

owners, who then assumed full control of Respondent and of the operation of its said Roswell plant. At that time and for approximately a year and a half thereafter, only 39 employees were engaged in working for Respondent at said plant, of whom 19 were transit mix truck drivers. At no time from and after date of December 12, 1958, has Respondent had lodged against it any charge of any unfair labor practice of any kind until the charge filed on September 10, 1960, which led to this proceeding. At all times Respondent's relationships with its employees have been harmonious and amicable.

On October 12, 1958, the National Labor Relations Board had rendered its decision and order affirming the Intermediate Report filed by the Trial Examiner on February 28, 1958, wherein Respondent, under its former and entirely different management, had been found guilty of unfair labor practices in refusing to bargain collectively with the union known as Local Union No. 492 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in unilaterally instituting wage increases and employment benefits on September 5, 1957. This decision and order was upheld by the judgment of this Court entered on January 18, 1960. Ever since the rendition of said judgment Respondent has fully complied therewith, and, as admitted and averred in Paragraph III, 1, of said Petition, Respondent has been engaged in collective bargaining negotiations with said union. As averred in Paragraph III, 2, of the petition, it was in the course of such negotiations that Respondent caused the letter of August 2, 1960, to be addressed to said union. This was done in a good faith effort to effect an agreement on general wage increases and to inform the union what Respondent was willing to do in regard thereto.

The union never answered said letter, never agreed or objected to the proposed wage increases set out therein, and never made any counter proposals in respect thereto.

Beginning about June, 1960, there had developed a great amount of business activity in the Roswell area, due to the fact that the United States Government had contracted for the construction of twelve missile launching bases at a reported cost in excess of twenty two million dollars ($22,000,000). This projected outlay naturally caused wages in this area sharply to rise, particularly among construction workers, truck drivers, machinery and equipment operators, and employees of the type generally used by F. M. Reeves And Sons, Inc., at said plant. From the time the present owners acquired the Roswell plant in December, 1958, on up to August, 1960, there had been no general increase in wages at said plant.

During the summer of 1960, Respondent was awarded a contract for supplying all of the ready-mixed concrete for the construction of said twelve defense missile launching bases, which involved delivering to the various sites a total of about 86,000 cubic yards of material, at a cost of from $1,800,000 to $2,000,000. In view of the fact that these launching bases were to be constructed at widely separated points, some as much as twenty-five miles from Roswell, it became necessary for Respondent to hire a much larger labor force at said plant. In June, 1960, the total number of employees at the Roswell plant was about 39, of whom 19 were transit mix truck drivers. By the first week in August, the total number of such employees had risen to about 46, of whom 14 were transit mix truck drivers. By November, 1960, Respondent's said labor force had risen to 93, of whom 27 were transit mix truck drivers.

In order to properly handle its part of the work in constructing this important defense project within the limited time fixed by the Government contract, and because of the difficulty in obtaining and holding labor in the Roswell area, it was necessary, in the summer of 1960, for Respondent to arrange for the transfer of some seven transit mix truck drivers from its affiliated plants located in Odessa, Texas, and elsewhere. The transfer of these employees was accomplished in the latter part of July, 1960.

The men thus tranferred had been earning from $1.35 to $1.50 per hour. They agreed to pay all moving expenses for themselves and their families, and to work as transit mix truck drivers at the Roswell plant, in return for Respondent's agreement to pay them $1.85 per hour for such work.

When these men who were thus transferred began work at the Roswell plant, the transit mix truck drivers already employed at said plant were receiving only $1.70, $1.75 or $1.80 per hour. Most of these men were earning $1.70 per hour, and none had ever received a wage increase. These men had proven their worth by long and faithful service to the company, and as stated, it was necessary that their wages should be raised to $1.85 per hour to maintain equality with the wages being paid pursuant to prior agreement to the transferee workers. Such raises amounted to five cents to fifteen cents per hour, as hereinbefore shown.

Three men theretofore employed by Respondent at its Roswell plant were at about this time promoted and made foremen. These men had been receiving $1.85 per hour. Their established wages as foremen were $1.90 per hour. Such higher rate of pay was in no sense a wage increase for these men, but was compensation fixed for the jobs to which they had been promoted.

No transit mix truck driver in the employ of Re-

spondent has received, or is receiving, more than $1.85 per hour, nor have any wage increases been given by the present management to any employees at Roswell except to the transit mix truck drivers for the reasons and in the circumstances herein explained, and except for three unskilled laborers who had long and faithfully served in the employ of Respondent and whose wages, out of dire necessity resulting from the rise in the cost of living, were raised from $1.25 to $1.35 per hour. This was an equitable adjustment long overdue.

As shown in its letter of August 2, 1960, Respondent stated to the union its willingness to make general wage increases to all its employees at the Roswell plant, which increases it had every reason to believe were due and would be gladly received by the union's membership. As heretofore stated, the union never replied to this letter, never agreed or objected to the proposed general wage increases expressly set out therein and never made any counter proposals in respect thereto. After waiting until August 9, 1960, without having received any answer to its said letter of August 2, 1960, or any counter proposal on the subject of wages, Respondent reasonably assumed and understood that the union negotiators were still unwilling to make any agreement on general wage increases. Accordingly, Respondent in perfect good faith, put into effect the necessary and limited wage increases for its transit mix truck drivers and three laborers, as hereinbefore set out. While such limited wage increases were instituted on August 9, 1960, they were made effective as of August 1, 1960, for the reason that payroll checks were in the process of being prepared on August 9 for the work week which had already begun on August 1.

On or about August 2, 1960, the union asked Respondent's counsel at McAllen, Texas, for further negotiating

meetings in Roswell, New Mexico, on August 10-11-13, 1960. Since it was impossible for Respondent's counsel to come to Roswell on the dates mentioned, the meetings were by agreement postponed, and were held in Roswell on August 16-17, 1960. At said meetings, Respondent through its counsel, fully explained to the union representatives present what had been done in respect to the limited wage increases hereinbefore set out, and further explained the reasons and necessity therefor, all as hereinabove set out. There was not the slightest objection or question raised at said meetings by the union representatives concerning what had been done, and Respondent reasonably assumed and understood that said action was concurred in by the union, inasmuch as the parties had been and continued wholly unable to agree on general wage increases, and the union was steadfastly refusing to agree to such general wage increases unless Respondent should accede to its other demands, which Respondent was unable to meet. It was not until receipt, on or about September 10, 1960, of a copy of the Charge filed against it which led to the institution of this proceeding, that Respondent learned for the first time that the union was objecting to the limited wage increases hereinbefore described.

As clearly appears from the foregoing facts, the limited wage increases given by Respondent to a small group of its workers was not and could not with any degree of fairness or reasonableness be deemed an effort in any way to interfere with, restrain or coerce its employees. Nor can it truthfully be said that this Respondent, under its present management since December 12, 1958, has at any time refused to bargain collectively with the union.

On the contrary, the one and only ground of complaint set out in the petition is shown to be and was a

step taken by Respondent for perfectly legitimate reasons in its honest effort to maintain a labor force to enable it to perform a large contract important to the National Defense and wherein time is of the essence. No thought of union antagonism motivated Respondent in its efforts to handle this difficult situation. Even the increased wages now being paid to the small group of Respondent's employees, as hereinbefore shown, is much below wages being paid by competitors to the same type of employees in the Roswell area, particularly by the general contractor who holds the over all contract for the construction of these defense missile launching bases. Because of this fact, there has developed a large turnover in employment in the Roswell area, and Respondent has experienced much difficulty in maintaining its labor force, due to increased wages offered by competitors. In actual numbers, 63 employees have quit working for Respondent at its Roswell plant since January 1,1960, and have taken jobs elsewhere. It was and is imperative that an adequate labor force be maintained for Respondent to insure the proper and prompt delivery of concrete for the enormous construction work here involved. Without a continuous and adequate supply of such material all other work on the project is brought to a standstill. It was in pursuit of the lawful and laudable purpose of meeting such a situation that said limited wage increase was given in good faith, and without any thought or intent of inducing any employee to refrain from joining the union or from giving it their support.

As further evidence of the reasonableness and fairness of said limited wage increases made by Respondent for which contempt proceedings are now being prosecuted against it herein, Respondent would further show to the Court that it has received from Petitioner's

Assistant General Counsel a letter dated November 10, 1960, which states in part as follows:

> "As you will note from the prayer contained in our petition, it is not our intention to ask for a recission of the wage increases that have already been put into effect."

In plain words, Petitioner wants maintained the wage increases that Respondent set up, but at the same time Petitioner wants Respondent penalized and punished for putting them into effect. In the fact of such recognition and ratification by Petitioner of said wage increases, Petitioner has no standing to complain thereof, and should be repelled from this Court.

For all of the foregoing reasons, Respondent says that it has not violated, disobeyed or refused to comply with the decree of this Honorable Court, and is not in contempt thereof.

WHEREFORE, Respondent prays that this petition be dismissed with prejudice.

F. M. REEVES AND SONS, INC.,
By SCOTT TOOTHAKER.

Scott Toothaker,
1630 North Tenth Street,
McAllen, Texas.

THE STATE OF TEXAS,
County of Hidalgo, ss:

SCOTT TOOTHAKER, being first duly sworn, deposes and says that he is the Attorney for F. M. Reeves and Sons, Inc., a corporation; that he is duly authorized to execute and file the foregoing answer; that he has read said answer and knows the contents thereof, and

that the statements therein made upon personal knowledge are true, and those made on information and belief he believes to be true.

SCOTT TOOTHAKER.

Sworn to and Subscribed before me this 16th day of December, 1960.

VIDA C. OVERSTREET,
Notary Public In and For
Hidalgo County, Texas.

My Commission expires —— —, —.

CERTIFICATE OF SERVICE

A copy of the Respondent's Answer to Petition for Adjudication in Civil Contempt in the above cause was this day served by first-class mail upon the counsel listed below:

Marcel Mallet-Prevost,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

SCOTT TOOTHAKER.

Dated at McAllen, Texas, this 16th day of December, 1960.

3. *Motion to Amend Contempt Petition*

COPY OF TELEGRAM

MARCEL MALLET-PREVOST
National Labor Relations Board
Division of Litigation
Appellate Court Branch
December 21, 1960

United States Court of Appeals
for the Tenth Circuit,
Denver, Colorado

Re: No. 6125—*N.L.R.B.* v. *F. M. Reeves, Inc.*

The Board hereby respectfully requests permission to amend its petition for adjudication in civil contempt by adding the following allegation as paragraph III A. "Respondent is further violating the good faith bargaining obligation imposed by this Court's decree and Section 8(a) (5) of the National Labor Relations Act by insisting in the course of negotiations that the Union secure performance of its obligations under any contract entered into by providing $25,000 performance bond or an equivalent thereof." The Board consents to an extension of time to and including December 28, 1960, for respondent to answer this allegation. Copy of this telegram sent to respondent and its counsel.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

4. *Answer to Motion to Amend Contempt Petition*

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6125

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

F. M. REEVES AND SONS, INC., RESPONDENT

RESPONDENT'S ANSWER TO PETITIONER'S MOTION FOR LEAVE TO AMEND

Respondent, F. M. Reeves and Sons, Inc., for answer to Petitioner's motion to amend its petition in the manner set out in its telegram addressed to the Court under date of December 21, 1960, says that said motion should be disallowed for the following reasons, to-wit:

1. The decree Respondent is charged with violating contains no prohibition against Respondent's calling on the Union to give bond as security for performance of its contract obligations, and hence, even if such demand was made, the same would be immaterial in this contempt proceeding.

2. The proposed amendment shows on its face that it is being offered in support of the charge of Respondent's bad faith in bargaining. The petition, by paragraph II, 1, (a), already makes the charge that Respondent has refused to bargain in good faith, and this charge has been directly denied in Respondent's answer. At the hearing the heavy burden will rest on Petitioner to establish by clear and convincing proof Respondent's bad faith, the same to be shown by competent evidence and by witnesses subject to cross-examination. *N. L. R. B.* v. *Standard Trouser Co.*, 162 F. 2d 1012, 1014 (C.C.A. 4th, 1947). *N. L. R. B.* v. *Little Rock Furniture Co.*, 123 F. 2d 868 (C.C.A. 8th.

1941), *N. L. R. B.* v. *Cleveland Trust Co.*, 214 F. 2d 95, 99 (C.A. 6th, 1954—citing numerous cases). What Petitioner is now seeking to do by this amendment is to inject into the pleadings purely evidentiary matter to bolster its charge of Respondent's alleged refusal to bargain in good faith, which charge is already at issue. This is not the proper time or manner for bringing before the Court evidentiary matter on that issue. All competent evidence may be offered at the hearing, under the pleadings already filed.

3. In substance and in effect Petitioner is seeking to call for an admission with respect to a specific fact, without complying with Rule 36 (a), F. R. C. P. under which procedure the immateriality of the alleged fact can be raised by objection.

For all of the foregoing reasons, it is respectfully submitted, the motion to amend should be disallowed.

SCOTT TOOTHAKER,
Attorney for Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing answer was this day served by first class mail upon Counsel for Petitioner at the address listed below:

Marcel Mallet-Prevost, Esquire,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

SCOTT TOOTHAKER,
1630 North Tenth Street,
McAllen, Texas,
Attorney for Respondent.

DATED at McAllen, Texas, this 27th day of December, 1960.

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